

Nuclear Cooperation Agreement with Russia: Statutory Procedures for Congressional Consideration and Their Implementation

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Summary

On May 13, 2008, President Bush submitted to Congress a proposed agreement for nuclear cooperation with the Russian Federation. On September 8, the President announced that he was rescinding his certification of the proposed U.S.-Russia nuclear cooperation agreement. This action, in effect, withdrew the proposed agreement from further congressional consideration for the foreseeable future.

Under the Atomic Energy Act (AEA), the *text* of such an agreement is to be submitted to the committees of jurisdiction for at least 30 days of consultation, and the agreement *itself* is then to be submitted to Congress for 60 days, during which the committees are to consider it and report recommendations. The AEA requires the President to state his approval of the agreement before the 60-day period begins, but he did so in his initial letter of submission, perhaps rendering moot the consultative purpose of the 30-day period.

Such an agreement would go into effect unless a joint resolution of disapproval is enacted by the end of the 60-day period, which, the President's submittal stipulated, will immediately follow the 30-day period. Both periods are measured in "days of continuous session," which includes all days except recesses of either house of more than three days, with "continuity" broken only by the *sine die* adjournment of a Congress. September 8, when the August recess is to end, is to be the 59th day of the full 90-day period, and the projected *sine die* adjournment on September 26 may be only the 77th day. A later *sine die* adjournment, a "lame duck" session, recall by the President or by congressional leadership, or the use of *pro forma* sessions instead of recesses could allow the 90th day to be reached within the 110th Congress. Otherwise, the agreement could not take effect until the end of a new disapproval period starting anew after the 111th Congress convenes in January, 2009.

The AEA prescribes an expedited procedure for Senate consideration, including committee discharge, a non-debatable motion to proceed to consider, a 10-hour limit on consideration, and a prohibition on amendments. For the House, the Committee on Rules is invited to prescribe similar terms of consideration. A disapproval resolution was introduced in the House on May 14, and another, by committee leaders, as the AEA prescribes, at the start of the 60-day period on June 24. On the same date, Senate committee leaders introduced a resolution of approval. Although enactment of the approval resolution neither block nor hasten the effectiveness of the agreement, it could apparently be considered under the expedited procedure, and might thereby prevent expedited action on a disapproval resolution. Congress could also disapprove the agreement, or approve it with conditions, by enacting an alternative measure under its general rules. The President might likely veto any disapproval or conditional approval, in which case the agreement would go into effect unless Congress overrides the veto before the end of the disapproval period. Inasmuch as the President may take 10 days for his action, the timely enactment of a disapproval resolution may be feasible only if Congress initially passes it with more than 10 days remaining in the disapproval period. This report will not be updated.

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Most Recent Developments

On September 8, 2008, President George W. Bush officially notified Congress that, in light of military actions taken by the Russian Federation against the nation of Georgia, he was rescinding his statutorily required certification of the proposed U.S.-Russia nuclear cooperation agreement.¹ The President's action, in effect, withdrew the proposed agreement from further congressional consideration for the foreseeable future.

The President's notification raised the possibility that should circumstances "permit future reconsideration of the proposed Agreement, a new determination will be made and the proposed Agreement will be submitted for Congressional review" pursuant to section 123 of the Atomic Energy Act.² In light of these developments, this report is being archived and will not be updated.

Introduction and Overview

Nuclear Cooperation with Russia and the Atomic Energy Act

On May 13, 2008, President Bush submitted to Congress a proposed agreement for civil nuclear cooperation with the Russian Federation.³ In accordance with the non-proliferation provisions of the Atomic Energy Act, as amended (AEA or "the act"),⁴ agreements for nuclear cooperation may go into effect only following an opportunity for congressional consideration defined by section 123. of the act (42 U.S.C. 2153),⁵ on account of which these agreements are sometimes known as "123 agreements." For an agreement like that with Russia, the effect of these provisions is that the agreement will go into effect at the end of 90 "days of continuous session" of Congress after it is initially submitted, unless, during that time, a joint resolution disapproving the agreement is enacted through procedures defined in section 130. of the act (42 U.S.C. 2159).

This report first sketches the procedures prescribed by the AEA for congressional action in relation to agreements of this kind, then summarizes legislative proceedings occurring in relation to the proposed agreement with Russia since its May 13 submittal. Thereafter, the report addresses several questions of the implementation and intent of these statutory requirements that are raised by their application to the proposed agreement with the Russian Federation. Special

¹ *Congressional Record*, daily edition, vol. 154, October 8, 2008, p. S8125.

² *Ibid.*

³ For information on policy issues associated with the proposed agreement with Russia, see CRS Report RS22892, *U.S.-Russian Civilian Nuclear Cooperation Agreement: Issues for Congress*, by Mary Beth Nikitin.

⁴ Legislation governing atomic energy was originally enacted in the Atomic Energy Act of 1946 (Public Law 585, 79th Cong., 60 Stat. 755). The 1946 act was comprehensively amended by Atomic Energy Act of 1954 (Public Law 703, 83rd Cong., 68 Stat. 919), which added the initial version of the non-proliferation provisions, now codified chiefly at 42 U.S.C. 2151-2160d (Subchapter X, "International Activities," of Chapter 23, "Development and Control of Atomic Energy," of Title 42, "Public Health and Welfare"). These provisions included pertinently sec. 123. (68 Stat. 940, 42 U.S.C. 2153), which defines requirements for nuclear cooperation agreements and for their approval. Sec. 308 of the Nuclear Nonproliferation Act of 1978 (P.L. 95-242, 92 Stat. 120 at 139) added the initial version of section 130. (42 U.S.C. 2159), which establishes expedited procedures for legislation to approve or disapprove nuclear cooperation agreements. Section 301(b)(2)(B) of P.L. 99-64 (99 Stat. 120 at 161) added subsection 130.i. (42 U.S.C. 2159(i)), which establishes the expedited procedure now applicable to the proposed agreement with the Russian Federation.

⁵ This report follows the form of the enacting statutes in using periods in the designation of sections and subsections (for example, sections 123.d. and 130.i.). The codified versions of these provisions are designated with the more usual parentheses (for example, 42 U.S.C. 2153(d) and 2159(i)).

attention is given to the definition of “days of continuous session” and the consequences if the requisite period is not completed before the end of the 110th Congress.

Specific questions addressed in this report about congressional action on the proposed agreement and its potential effects include:

- What does the President submit, when, to whom, and with what effect?
- How and when are resolutions of disapproval (or approval) introduced?
- How might the requirement for automatic discharge of a resolution of disapproval (or approval) come to bear?
- How might congressional action on a resolution of disapproval (or approval) come about?
- What proceedings would have to occur for the nuclear cooperation agreement with Russia to be disapproved or approved?
- What possibilities of disapproval (or approval) of the agreement exist other than pursuant to the statutory procedures?

Summary of Procedural Requirements

Section 123.a. of the AEA establishes nine requirements that a proposed agreement for nuclear cooperation must either meet or receive presidential exemption from meeting. The remainder of section 123. prescribes different regulations for congressional action depending on whether or not the agreement requires this exemption and on other features of its terms. As explained below, the procedural regulations applicable specifically to the proposed agreement with Russia depend principally on three features of the agreement: (1) it requires no exemption for failure to meet any of the nine requirements; (2) it includes provisions relating to “large reactors;” and (3) it covers only civil uses of atomic energy.

Section 123.a. provides that if a proposed agreement requires no exemption, it may go into effect at a prescribed point unless Congress acts before then to disapprove it.

Section 123.b. specifies that unless an agreement involves military-related uses of nuclear energy, the President is to submit its text to the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs for a period of “not less than 30 days of continuous session” for consultation.⁶ This submission is to be accompanied (for agreements like that with Russia) by an unclassified Nuclear Proliferation Assessment Statement (NPAS) prepared by the Department of State.⁷

Section 123.d. directs that if the agreement involves large reactors,⁸ the President is to submit it, along with additional supporting documents, to Congress for a period of 60 “days of continuous session.” The supporting documents include (1) any classified annexes to the NPAS; and (2) a statement of the President’s approval of the agreement and determination that it “will promote, and will not constitute an unreasonable risk to, the common defense and security.” The measure is

⁶ The requirements of section 123.b. (42 U.S.C. 2153(b)) apply to agreements not “arranged pursuant to subsection 91(c), 144(b), 144(c), or 144(d)” of the Atomic Energy Act (42 U.S.C. 2121(c), 2164(b), 2164(c), or 2164(d)). These provisions cover military uses of atomic energy.

⁷ The NPAS is described in section 123.a. (42 U.S.C. 2153(a)).

⁸ The requirements of section 123.d. (42 U.S.C. 2153(d)) apply to agreements “entailing implementation of [42 U.S.C.] 2073, 2074(a), 2133, or 2134 ... in relation to a reactor that may be capable of producing more than five thermal megawatts or special nuclear material for use in connection therewith.” In practice, this category excludes chiefly small reactors used for purposes of research alone.

to be referred to the same two committees as specified under section 123.b., which are, during this 60-day period, supposed to hold hearings on the proposal and report recommendations to their respective chambers. The agreement goes into effect unless, by the end of the 60-day period, a joint resolution of disapproval is enacted into law pursuant to procedures prescribed by section 130.i.

Section 130.i. specifies the text for this joint resolution of disapproval and provides that a joint resolution with respect to the agreement be automatically introduced in each chamber, at the beginning of the 60-day period, in the House by the chairman and ranking minority member of the Committee on Foreign Affairs, and in the Senate by the two party floor leaders, or, in either case, by their designees. If a committee of referral does not report a joint resolution with respect to the agreement within 45 days,⁹ it is automatically discharged from further consideration of the introduced resolution. For the Senate, section 130.i. provides that the joint resolution may be called up on a non-debatable motion, time for consideration is limited to 10 hours, and amendments are prohibited. For the House, the statute invites the Committee on Rules to report a special rule incorporating comparable restrictions.

Legislative Action

President Bush submitted the proposed agreement for civil nuclear cooperation with the Russian Federation to Congress on May 13, 2008.¹⁰ The President's letter of submittal stated that the agreement was accompanied by his "approval and determination,"¹¹ as well as by the requisite unclassified NPAS.¹² The submittal letter also stated that the classified annex would be submitted separately (and it appears, in fact, that the committees of jurisdiction had already received this annex on May 12).

The inclusion of the unclassified NPAS met the requirements of the AEA to begin the 30-day period, and the inclusion of the President's "approval and determination," together with the separate submission of the classified annex to the NPAS, met the requirements for the 60-day period to start. The President's letter of submittal, accordingly, stated that this submission "shall constitute a submittal for purposes of both sections 123.b. and 123.d. of the Atomic Energy Act."

The letter of submittal, nevertheless, also expressed an understanding that the two periods would not both commence immediately, but instead would occur consecutively. It went on to declare that the 60-day period shall commence "upon completion of the 30-day period." Although it is unclear that the President can determine by declaration when the statutory periods start and end, these stipulations appear to conform to recent the past practice of both the President and Congress on agreements for nuclear cooperation. These practices appear to have the effect of treating the two periods, for practical purposes, as a single uninterrupted period of 90 days of continuous session.

⁹ Section 130.i. does not specify that the 45 days allowed for committee action are "days of continuous session." They would, instead, presumably be treated as calendar days or, alternatively, as legislative days. The significance of these differences is addressed below in the section on "Discharge of Committee."

¹⁰ U.S. Congress, House, *Proposed Agreement Between the United States of America and the Russian Federation Concerning Peaceful Uses of Nuclear Energy*, message from the President of the United States transmitting a proposed agreement between the Government of the United States of America and the Government of the Russian Federation for cooperation in the field of peaceful uses of nuclear energy, pursuant to 42 U.S.C. 2153(b), (d), H.Doc. 110-112, 110th Cong., 2nd sess. (Washington: GPO, 2008).

¹¹ *Ibid.*, p. 3.

¹² *Ibid.*, pp. 26-51.

In accordance with section 123. of the AEA, the President's message and the accompanying papers were referred to the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations.¹³ On May 14, 2008, a joint resolution of disapproval with the text required by section 130.i. was introduced in the House by a member of the Committee on Foreign Affairs.¹⁴ On June 12, the House Committee held a hearing on "Russia, Iran, and Nuclear Weapons: Implications of the Proposed U.S.-Russia Agreement," at which John C. Rood, Acting Under Secretary of State for Arms Control and International Security, appeared as a witness. On June 17, the Senate Committee on Foreign Relations received a closed briefing from William J. Burns, Under Secretary of State for Political Affairs, on "Russia, Iran and U.S.-Russian Nuclear Cooperation."

Under the stipulations stated in the President's letter of submittal, as explained below in "Days of Continuous Session in the 110th Congress," the 30-day consultation period ended on June 23 and the 60-day period for congressional action began on June 24. On June 24, pursuant to the statute, a joint resolution to *disapprove* the agreement was submitted in the House, and a joint resolution to *approve* the agreement was submitted in the Senate.¹⁵ The possible consequences of these different forms of resolution being submitted are considered below, in the section on "Resolutions of Disapproval."

Period for Congressional Disapproval

Definition of "Continuous Session"

Section 123. of the AEA specifies that the two time periods involved in the proceedings prescribed for the nuclear cooperation agreement with Russia are to be measured in days of continuous session, as defined by section 130.g. of the AEA. Section 130.g.(2) stipulates that

[F]or purposes of this section insofar as it applies to section 123 ... continuity of session is broken only by an adjournment of Congress sine die; and ... the days on which either House is not in session because of an adjournment of more than three days are excluded in the computation of any period of time in which Congress is in continuous session.¹⁶

The effect of this provision is that (1) any period of continuous session terminates only with the final adjournment of the last session of a Congress; but (2) in determining the length of a period of continuous session, any day on which *either* house is in a recess of its session is not counted. This arrangement is apparently intended to prevent a situation in which an agreement would go into effect only because Congress was not in session, or did not remain in session long enough to act on a disapproval resolution.

The definition established by section 130.g.(2) seems intended to correspond to the constitutional requirement that neither house may adjourn for more than three days without the consent of the

¹³ "Proposed Agreement With Russian Federation for Cooperation in the Field of Peaceful Uses of Nuclear Energy—Message from the President of the United States (H.Doc. No. 110-112," message inserted in House proceedings, *Congressional Record* [daily ed.], vol. 154, May 13, 2008, pg. H3701; "Text of a Proposed Agreement Between the Government of the United States of America and the Government of the Russian Federation for Cooperation in the field of Peaceful Uses of Nuclear Energy—PM 48," message inserted in Senate proceedings, *ibid.*, pp. S4103-S4104.

¹⁴ H.J.Res. 85 (Markey).

¹⁵ H.J.Res. 95 (Berman and Ros-Lehtinen, by request); S.J.Res. 42 (Biden and Lugar, by request).

¹⁶ Section 130.g.(2) (42 U.S.C. 2159(g)(2)).

other.¹⁷ Congress may adjourn for more than three days either (1) by ending its annual session (an adjournment *sine die*), or (2) by taking a recess within its annual session, such as the “non-legislative periods,” or “state” (or “district”) work periods” customarily scheduled, for example, around Memorial Day and Independence Day each year. In both cases, the two houses typically grant each other the required consent by adopting a concurrent resolution.¹⁸

Under the statutory definition, accordingly (1) continuity of session is broken just when Congress adjourns its last session pursuant to a concurrent resolution for a *sine die* adjournment; and (2) the count of “days of continuous session” pauses on exactly those days on which both houses, or either one of them, is not in session pursuant to a concurrent resolution for a recess of more than three days.¹⁹ On the other hand, a day on which either house, or both, is out of session for three consecutive days or fewer counts as a day of continuous session. If both houses adjourn from Friday to Tuesday, for example, not only the days each house is in session during the preceding and following week, but also the intervening three days of the extended weekend, count as days of continuous session.

Under the definition of section 130.g.(2), accordingly, until the final *sine die* adjournment of the 110th Congress, every calendar day, Saturdays and Sundays included, will count as a day of continuous session except those on which at least one house is out of session pursuant to a concurrent resolution providing for a recess of more than three days. Under the Constitution, however, the term of the 110th Congress expires on January 3, 2009. At some point before then, as a result, the 110th Congress must adjourn its last session *sine die*, or else it will automatically stand adjourned *sine die* at noon on January 3. As Under Secretary Rood affirmed in testimony before the House Committee on Foreign Affairs on June 12, this *sine die* adjournment will put an end to the existing period of continuous session.²⁰ If Congress adjourns *sine die* without acting on the proposed agreement, and before 90 days of continuous session are completed, the agreement will not take effect until a new period of continuous session, beginning *ab initio* when the 111th Congress convenes, has reached the requisite length.²¹

In colloquy with members of the Committee, Under Secretary Rood also expressed his understanding that the 90-day period was measured separately in each house and, for each house, included only the days on which that house was in session. On this understanding, for example, if the House were out of session on Thursday while the Senate met, and the Senate were out of session on Friday while the House met, one day of continuous session would be counted for each chamber.²² This interpretation appears to overlook that days of continuous session may occur even if one house is, or both houses are, out of session (as long as they are out of session for no more than three consecutive days). In addition, section 131.g. is not couched in terms of separate counts in each house, but explicitly refers to the continuous session of Congress as a whole. The

¹⁷ In figuring the length of an adjournment, Sundays are not counted, but “either the day of adjourning or the day of meeting ... must be taken into the count.” W[illia]m Holmes Brown and Charles W. Johnson, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* (Washington: GPO, 2003), chapter 1, sec. 10.

¹⁸ A concurrent resolution is used because this form of measure requires the agreement of both houses, but is not presented to the President for approval.

¹⁹ Several other expedited procedure statutes also make use of this means of counting days.

²⁰ CQ Transcriptwire, “House Committee on Foreign Affairs Holds a Hearing on Russia, Iran, and Nuclear Weapons,” June 13, 2008, available at <http://transcriptswire.cq.com/do/transcriptView?id=259144>.

²¹ The question of how long the period of continuous session in the new Congress would have to be is addressed below in the section on “Possible Need to Renew Action in the 111th Congress.”

²² CQ Transcriptwire, “House Committee on Foreign Affairs Holds a Hearing on Russia, Iran, and Nuclear Weapons,” June 13, 2008.

language quoted at the outset of this section implies that a single count covers both houses, and states explicitly that when *either* house takes a recess (of more than three days), the count of days pauses until *both* houses are back in session. The estimates in the following sections follow this last interpretation of the quoted provision.

Days of Continuous Session in the 110th Congress

After President Bush submitted the nuclear cooperation agreement with Russia on May 13, 2008, Congress remained in continuous session, as defined by the AEA, until May 22, which amounted to nine days of continuous session. The House then entered a recess for Memorial Day, so that the count of days of continuous session paused.²³ (A non-legislative period of the Senate occurred during the same week, but that body took no adjournment of more than three days, meeting instead in periodic *pro forma* sessions, which the recess resolution had authorized it to do.)²⁴ On June 3, when the House reconvened, the count resumed, making that day the 10th day of continuous session. As a result, June 23 was the 30th day of continuous session and the last day of the 30-day period for consultation. In accordance with the declaration in the President's letter of submittal, June 24, being the 31st day of the overall 90-day period, became the first day of the 60-day period for congressional action.²⁵

For the Independence Day non-legislative period, both houses adjourned for more than three days, but the recess of the House extended from June 27 through July 7, whereas that of the Senate extended from July 1 through July 6. On this occasion again, as a result, it was the schedule of the House, which took the longer recess, that defined the period excluded from the count of days of continuous session. The last day of House session before the recess, June 26, was the 33rd day of continuous session in the overall 90-day period, and the day of its return, July 8, became the 34th day.

No further recess of either house occurred until August 1, which accordingly represented the 58th day of continuous session. Congress then entered a summer non-legislative period pursuant to H.Con.Res. 398, which stipulated that both chambers reconvene on September 8. During this non-legislative period again, the Senate arranged to meet in periodic *pro forma* sessions, so that no adjournment of more than three days occurred in that chamber. The House, on the other hand, did not schedule any *pro forma* sessions in the intervening period, so that an adjournment of more than three days did occur there. Inasmuch as one house was taking an adjournment of more than three days, the count of days of continuous session paused during this period. Unless both Houses return before then pursuant to either the contingent reassembly provisions of H.Con.Res. 398 or a call by the President, September 8 will be the 59th day of continuous session.

Any further projection of days of continuous session is dependent on assumptions about subsequent recesses and an adjournment *sine die*. The schedules previously announced by the majority party leadership in each chamber project no further recesses during the present session.²⁶

²³ This recess occurred pursuant to H.Con.Res. 355, adopted May 22, 2008.

²⁴ The effects of *pro forma* sessions on the procedural requirements of the AEA are explained in the section on “*Pro Forma Sessions*,” below.

²⁵ This calculation, like all the calculations and projections presented in this report, presumes that the first day of the 30-day period is the day following the submission of the text to the committees, and that the first day of the 60-day period is the day immediately following the 30th day of the 30-day period. These ways of counting conform to the usual congressional practice for day counts.

²⁶ The schedules used in making these calculations were those posted at http://www.senate.gov/legislative/resources/pdf/2008_calendar.pdf for the Senate and <http://www.majorityleader.gov/docUploads/2008-CALENDAR.pdf> for the

The House schedule projects adjournment *sine die* on September 26, 2008; the Senate schedule includes no projection for this event. If the chambers follow these schedules, it appears that September 26, 2008 will be the 77th day of continuous session.²⁷ Accordingly, if Congress adjourns *sine die* on this date, continuity of session will be broken before the 90th day is reached, and the proposed agreement with Russia will not be able to take effect before the end of the 110th Congress. A new period of continuous session will begin when the 111th Congress convenes, and the agreement with Russia will be able to take effect under the AEA only at the conclusion of this new period of continuous session.²⁸ If, on the other hand, Congress does not adjourn *sine die* on September 26, and neither house takes any further recess, the 90th day of continuous session could be reached on October 9, and the agreement with Russia could accordingly take effect on that date.²⁹

The ability of Congress to disapprove the proposed agreement depends not only on whether the two houses can complete their initial action on a resolution of disapproval before the prescribed period of continuous session expires. Section 123. of the AEA prescribes that the agreement can be disapproved only if the joint resolution of disapproval is actually enacted into law within the prescribed period. If the President vetoes a disapproval resolution, as a result, the agreement will go into effect unless both houses can complete action to override the veto within 90 days of continuous session after its submission. Inasmuch as the President has 10 days to act on a measure presented for his approval (Sundays excepted), Congress might, in practice, be unable to prevent an agreement from taking effect unless it completes its initial action on the disapproval resolution by about the 88th day of continuous session. These consequences are pursued in more detail in the later section on “Presidential Action.”

Potential Effect of Alterations in Schedule

Whether or not the continuous session of the 110th Congress reaches its 90th day before its adjournment *sine die* could potentially be altered in any of several ways. First, Congress could adopt concurrent resolutions establishing additional recesses of its session, including a recess spanning the election, after which Congress would reconvene in a “lame duck” session. Second, Congress could be reconvened, either during a recess or after a *sine die* adjournment, either by its leadership or by pursuant to the constitutional authority of the President. Finally, through the use of periodic *pro forma* sessions in both houses, a scheduled recess period could be converted into a period of continuous session.

“Lame Duck” Session

In some recent election years, Congress did not adjourn *sine die* before the elections, but instead recessed its session in early autumn and reconvened after election day for what is called a “lame duck session” (more accurately, a “lame duck” portion of its regular session). The leadership of both houses is said to intend to avoid this practice in the 110th Congress by concluding the

House, both visited on July 2, 2008.

²⁷ This figure is one day less than that estimated in the initial edition of this report. The difference occurs because the House began its Independence Day recess on June 27 rather than, as originally scheduled, June 28.

²⁸ The required length of this new period of continuous session, and other considerations relevant to the extension into a new Congress of action on the proposed agreement with Russia, are pursued below in the section on “Possible Need to Renew Action in the 111th Congress.”

²⁹ The actual schedule of Congress during this period, however, may be affected by the occurrence of Yom Kippur on this date, as well as by that of Rosh Hashana on September 30.

business of the session, and adjourning *sine die*, before election day (November 4).³⁰ If, however, Congress in the end takes a recess spanning the election, the occurrence of the 90th day of continuous session will depend on the dates of recess and reconvening.

For example, Congress might recess on September 26 and reconvene on November 12 (the day after Veterans' Day). Under these conditions, if September 26 had been the 77th day of continuous session, the 90th day could occur on the 13th calendar day following the reconvening, which, in the case supposed, could be November 24 (the Monday preceding Thanksgiving). If the 110th Congress remained in session until this date and on this schedule without a disapproval resolution being enacted, the agreement with Russia would be able to take effect after this date.

Leadership or Presidential Action to Reconvene Congress

In recent years, concurrent resolutions providing for recesses of the session or *sine die* adjournments have normally provided contingent authority for the bicameral leadership to call Congress back into session before it is scheduled to reconvene, "if the public interest shall require it."³¹ It is also possible that the President might use his constitutional authority to reconvene Congress during a scheduled recess, or after a *sine die* adjournment and before the scheduled opening of the following session.³²

If, by either of these means, Congress were to be reconvened during any recess, including one spanning the election, the days on which Congress met pursuant to that call would be converted from recess days to days of continuous session. If as many as 13 additional days of continuous session occurred as a result of this change, the 90th day of continuous session counting from the May 13 submission could occur before the 110th Congress adjourns *sine die*, in which case the agreement with Russia could take effect before the 111th Congress convenes.

Corresponding considerations could apply if the 110th Congress were to adjourn *sine die* before the 90th day of continuous session was reached, but were called back before the expiration of its term on January 3, 2009. Inasmuch as the term of the 111th Congress would not yet have begun, the Congress that would reconvene would still be the 110th Congress. The continuity of session as defined by section 130.g.(2) of the AEA would not have been broken, and the previous count of days of continuous session would presumably resume from the point at which it had left off. Under these conditions as well, the current period of continuous session might reach 90 days before the end of the 110th Congress, and the proposed agreement with Russia could take effect.

The way in which this continuity would be realized, however, would differ depending on whether Congress were called back by its own leadership or by the President. If Congress reconvened pursuant to the call of the leadership, the action would presumably vitiate the *sine die* character of the previous adjournment, and the 110th Congress would presumably resume its present (second) session. If, on the other hand, Congress were reconvened by the President after a *sine die* adjournment, it would meet in a new session, which would be the third session of the 110th Congress. Continuity of session would be maintained, in that case, because the *sine die*

³⁰ Christian Bourge with Ben Schneider contributing, "House, Senate Dems Appear Intent on Avoiding Lame Duck," *CongressDaily PM*, July 14, 2008, available at http://www.nationaljournal.com/congressdaily/cdp_20080714_3104.php?related=true&story1=cdp_20080710_4835&story2=cdp_20080714_3104&story3=am_20080226_2, accessed July 30, 2008.

³¹ For a current example of an adjournment resolution providing this authority, see H.Con.Res. 398, 110th Cong., adopted July 31, 2008.

³² Article II, section 3.

adjournment of the present session would cease to qualify as the *sine die* adjournment of the 110th Congress.

Pro Forma Sessions

Pro forma sessions are those held merely “for the sake of form,” or as a formality. Typically, no legislative business is conducted; on some occasions, the chamber provides in advance (usually by unanimous consent) that no business may occur. Pro forma sessions count as days of session for purposes of determining whether an adjournment of more than three days is occurring.³³

The resolution authorizing the non-legislative period for George Washington’s Birthday in 2008, for example, did not provide for a recess in the constitutional sense.³⁴ Although the resolution covered essentially the period defined by the announced schedules, it did not provide for a recess of more than three days, but instead directed pro forma sessions of the House at least every fourth day, and authorized the Senate to arrange a similar schedule. Inasmuch as the Senate proceeded to exercise this authority, no “adjournment of more than three days,” as contemplated by the Constitution and section 130.g.(2) of the AEA, occurred in either house during this period.³⁵ Instead, every day of the non-legislative period counted as a day of continuous session.

At the July 12 hearing of the House Committee on Foreign Affairs, Under Secretary Rood noted that days with pro forma sessions count as days of continuous session.³⁶ He did not note that this will be true only if the other house also is not in recess. If both houses hold pro forma sessions at least every fourth day during a non-legislative period, no “adjournment of more than three days” occurs in either house. Nor did Under Secretary Rood explicitly note that under these conditions, not only the days of pro forma session themselves, but also the remaining days of the non-legislative period, will count not as days of recess, but as days of continuous session.

It is possible that no pro forma sessions will be used in these ways to affect the length of continuous session of the current Congress. Days occurring during non-legislative periods will count as days of continuous session only if they are covered by periodic pro forma sessions in both chambers; if only one chamber holds pro forma sessions while the other takes a recess of more than three days, the days of the recess will still not count as days of continuous session. The resolution providing for the August 2008 non-legislative period, for example, authorized only the Senate to schedule pro forma sessions, and provided for a recess of the House in the constitutional sense. Pursuant to section 130.g.(2) of the AEA, inasmuch as one house has been in recess during this period, the days of this recess are excluded from the count of days of continuous session. Under these conditions, as already discussed, the date scheduled for *sine die* adjournment of the House will presumably arrive before the 90th day of continuous session has been reached after submission of the agreement.

³³ It is, in fact, exactly this “formality” for the “sake” of which *pro forma* sessions may be held. If a chamber holds a *pro forma* session at least every fourth day, it can avoid the need to obtain the permission of the other for holding no sessions on the intervening days.

³⁴ H.Con.Res. 293, 110th Cong., agreed to February 14, 2008.

³⁵ The resolutions providing for these “recesses,” accordingly, were technically not necessary to meet constitutional requirements. Media reports indicate that Senate leadership decided to hold regular *pro forma* sessions in that chamber during scheduled recess periods in an attempt to prevent the President from making certain “recess appointments.” See Paul Singer, “Masters of a Pro Forma Senate,” *Roll Call*, January 7, 2008. These reports do not ascribe any motivation for the House to meet in *pro forma* session during these periods.

³⁶ CQ Transcriptwire, “House Committee on Foreign Affairs Holds a Hearing on Russia, Iran, and Nuclear Weapons,” June 13, 2008.

If, on the other hand, both houses had determined to hold periodic pro forma sessions during the August non-legislative period, the 90th day of continuous session could have occurred as early as Tuesday, September 2, 2008 (the day after Labor Day, and a date that would still fall within the non-legislative period).

For some recent periods of pro forma sessions, including the August period, the Senate has sometimes provided that no legislative business occur in the pro forma sessions.³⁷ If the 90th day of continuous session were to fall within a session recess governed by such a provision, Congress could become unable to act on a joint resolution of disapproval in a timely fashion, and in the absence of that disapproval, the agreement with Russia would presumably take effect on the date specified. This difficulty, however, might be overcome by use of the authority of the leadership or the President to reconvene Congress before the expiration of the recess. Being reconvened by either means would presumably supersede the order against conducting legislative business, and accordingly would enable Congress to consider a disapproval resolution rather than allow the agreement to enter into force by default.

Possible Need to Renew Action in the 111th Congress

If the 110th Congress adjourns *sine die* before the 90th day of continuous session after May 13, 2008, the period during which Congress could act to disapprove the agreement will not yet have elapsed, and the agreement with Russia will be unable to take effect under the AEA at that point. Instead, a new period of continuous session will begin with the convening of the 111th Congress in January 2009 (assuming the 110th Congress is not reconvened for the requisite remaining period after its *sine die* adjournment). Until this new period of continuous session reaches the requisite length, the entering into effect of the agreement will be postponed, and the opportunity for Congress to disapprove it pursuant to the AEA will remain available.

The AEA does not explicitly provide whether failure of the 110th Congress to complete the periods required under section 123. would necessitate starting from the beginning, in the 111th Congress, of the entire approval process or of only such parts of it as the 110th Congress did not complete. Inasmuch as the AEA makes provision for the process it prescribes to continue after a break in the continuity of session, it could be read as implying that the submission of an agreement triggers a single process of congressional action that may carry over into a subsequent Congress. The definition of “continuous session” in section 130.g.(2) seems expressly to contemplate that a new period of continuous session would begin automatically with the convening of the 111th Congress.

Rigorously applied, this view could imply that the 111th Congress would not have to repeat statutory requirements that had already been accomplished in the 110th Congress. For example, inasmuch as the President has already submitted the text of the agreement to the committees, made the required approval and determination, submitted the agreement itself to Congress, and submitted the NPAS and its classified annexes, he would not have to carry out these requirements anew in the 111th Congress. It could be argued, as well, that inasmuch as 30 days of continuous session were completed during the 110th Congress after the submission of the text on May 13, 2008, the 30-day consultation period required by section 123.b. would not have to be repeated in the 111th Congress. On this view, the first day of the 111th Congress could be construed as the beginning of the 60-day period prescribed by section 123.d. for congressional action on the agreement and, accordingly, as the day on which new joint resolutions of disapproval should

³⁷ See, for example, Sen. Harry Reid, “Orders of Procedure,” proceedings in the Senate, *Congressional Record*, daily edition, vol. 154, May 22, 2008, p. S4849; Sen Harry Reid, “Conditional Adjournment or Recess of the House of Representatives and the Senate,” *ibid.*, July 31, 2008, p. S7880.

automatically be introduced. Further, by this interpretation, if no joint resolution of disapproval were to be enacted by the end of the 60th day of continuous session of the 111th Congress, the agreement would automatically go into effect.

At the June 12 hearing of the House Committee on Foreign Affairs, on the other hand, Under Secretary Rood took the position that, if the full period of 90 days of continuous session is not completed within the 110th Congress, the entire period must begin *de novo* in the 111th Congress.³⁸ Under this interpretation, it might also be held necessary for the President to resubmit the agreement itself to Congress in the new session, in the way provided in the AEA. Absent this resubmittal, it could be argued, no date could be fixed at which the disapproval resolution would be automatically introduced. Although no established guidance or previous proceedings appear to settle this point definitively, there are indications that both houses would be likely to pursue this interpretation of the act.

Under this interpretation of the AEA, and if the statutory requirements are implemented in the 111th Congress in the same way as the 110th, the Presidential resubmission of the agreement with Russia would presumably have to be accompanied by the requisite unclassified NPAS and its classified annexes, as well as the approval and determination of the President. The committees to which the text of the agreement is submitted would presumably be intended to engage in consultations with the executive on the agreement during the 30 days of continuous session following submission. The leaders identified by the statute would presumably have to introduce new resolutions of disapproval on the first day of the following period of 60 days of continuous session, and the agreement would go into effect if no resolution of disapproval were to be enacted by the end of that 60-day period. Unless a disapproval resolution were enacted, accordingly, the agreement with Russia would go into effect at the end of 90 days of continuous session after the President submitted it to the 111th Congress.

In favor of this interpretation of the act, it could be argued that the newly constituted committees in the 111th Congress might not wish to be compelled to rely on the consultations and deliberations engaged in by their predecessors. In addition, of course, inasmuch as any resolution of disapproval submitted in the 110th Congress will die with a *sine die* adjournment, any such resolution could be considered in the 111th Congress only if it were introduced anew in that Congress.

Statutory Procedure for Disapproval

Submission of the Agreement

Requirements for Submission

Several features of the language of section 123. indicate differences in purpose and intent between the 30-day period for consultation under section 123.b. and the 60-day period for congressional action under section 123.d. Under section 123.b., the President submits the *text* of the agreement to the *committees* having jurisdiction for *consultation*; under section 123.d. he submits the agreement *itself* to *Congress* for its *action*.

Section 123.b. further directs that the President consult with the committees receiving the submission for a period of “not less than 30 days of continuous session ... concerning the

³⁸ CQ Transcriptwire, “House Committee on Foreign Affairs Holds a Hearing on Russia, Iran, and Nuclear Weapons,” June 13, 2008.

consistency of the terms of the proposed agreement with all the requirements of” the non-proliferation provisions of the AEA. He is also to approve the proposed agreement and make “a determination in writing that ... [it] will promote, and will not constitute an unreasonable risk to, the common defense and security.” Under section 123.d., the 60-day period for congressional action begins when the President submits the agreement itself to the Congress, along with his “approval and determination,” and then only when the NPAS, including any classified annexes, has also been submitted to Congress.

The reference of section 123.d. to the “approval and determination of the President,” appears to address the same act of “approval” and “determination in writing” as required by section 123.b. Further, although section 123.b. does not explicitly require that the President must approve the agreement and make the required determination following the consultation with the committees, it can be read as implying that the consultation should precede this action. It is from such a reading of the statute that it appears possible to draw an implication that the 60-day period required by section 123.d. will not run concurrently with the 30-day period prescribed by section 123.b., but will instead follow that 30-day period. On the other hand, the AEA does not appear to require that the submission to Congress of the agreement itself must *immediately* follow the 30-day period for consultation.

Submission of Agreement with Russia

Two features of the President’s submission on May 13 do not appear to comport clearly with the statutory scheme. First, the President’s letter of submittal made explicit reference only to submitting the agreement to Congress for approval; it did not explicitly submit the text of the agreement to the committees of jurisdiction as well. Nevertheless, inasmuch as the submission did result in referral of the agreement to the committees, the President and Congress are apparently agreed in treating the submission of the agreement to Congress as also constituting submission of the text to the committees. It is this understanding, in effect, that enables the President by a single submission to fulfill the requirements of both sections 123.b. and 123.d.

Second, inasmuch as all requirements for both the periods required by the statute were met by the time of the submission on May 13, it might be questioned why the 30-day and the 60-day period should not both be considered as beginning at once. The chief reason against doing so appears to be the apparent presumption of the statute that the President’s “agreement and determination,” the submission of which is required for the beginning of the 60-day period for congressional action, is to follow and, in some sense, result from the consultation with committees that is supposed to occur during the period of at least 30 days.

Under this rationale, however, the President’s declaration of his “approval and determination” at the outset of the 30-day period could be viewed as rendering moot the consultative purpose of that period. The President’s letter of submittal, nevertheless, also declared the readiness of the Administration to “begin immediately the consultations ... provided in section 123.b.”

Resolutions of Disapproval

Requirements for Disapproval Resolution

Section 130.i.(1) of the AEA regulates the form that a joint resolution to disapprove a proposed agreement for nuclear cooperation must take in order to be eligible for expedited consideration under the further provisions of section 130.i. Section 130.i.(1) specifies that:

For purposes of this subsection, the term “joint resolution” means a joint resolution, the matter after the resolving clause of which is as follows: “That the Congress (does or does not) favor the proposed agreement for cooperation transmitted to the Congress by the President on .”, with the date of the transmission of the proposed agreement for cooperation inserted in the blank, and the affirmative or negative phrase within the parenthetical appropriately selected.

If the phrase “does not favor” is selected, the measure will be a resolution of disapproval; if “does favor” is selected, it will be a resolution of approval. The phrase “appropriately selected” might be read as signifying that, for agreements that may go into effect unless disapproved, resolutions of disapproval are to be introduced, and for those that may go into effect only if approved, resolutions of approval are to be introduced.

Pursuant to section 130.i.(2), such joint resolutions are to be introduced automatically in each chamber, in the House by the chairman and ranking minority member of the Committee on Foreign Affairs, and in the Senate by the two party floor leaders, or (in each case) their designees. The automatically introduced joint resolutions are to be introduced “by request,” signifying that the introducing Members do not necessarily advocate the measures. The AEA, however, appears to contemplate that other Members may also introduce joint resolutions.

Also pursuant to section 130.i.(2), the automatic introduction of these resolutions is to occur “on the day on which a proposed agreement for cooperation is submitted” to Congress under section 123.d. The date specified would be the first day of the period of 60 days of continuous session for congressional consideration mandated by section 123.d. Pursuant to section 130.i.(3), these resolutions are to be referred, in the Senate, to the Committee on Foreign Relations, and in the House to “the appropriate committee or committees,” which presumably would be, or at least include, the Committee on Foreign Affairs.

Resolutions on the Agreement with Russia

As noted in the section on “Legislative Action,” resolutions meeting the requirements of section 130.i.(1) were introduced with respect to the agreement with Russia in both chambers on the date, and by the Members, specified by section 130.i.(2). In the House, the chairman and ranking minority member of the Committee on Foreign Affairs introduced H.J.Res. 95 by request, and in the Senate the chairman and ranking minority member of the Committee on Foreign Relations introduced S.J.Res. 42 by request, evidently as designees of the two floor leaders.

The House measure is a joint resolution of disapproval, which, if enacted before the end of the 60-day period, would presumably have the effect contemplated by the statute of preventing the agreement from taking effect. The Senate measure, however, is framed as a joint resolution of approval, stating that the Congress “does favor” the proposed agreement. If this resolution were to be enacted within the 60-day period, it would neither prevent nor hasten the entering into effect of the proposed agreement. The agreement could still take effect at the end of the 60-day period, just as if Congress took no action in the matter. In taking this joint resolution of approval as fulfilling the requirements of section 130.i. in this case, the Senate is apparently interpreting the statutory direction that the relevant phrase in the resolution be “appropriately selected” not as requiring the form of the resolution to be appropriate to the process of approval or disapproval to which the agreement in question was subject, but instead simply as conferring discretion on the sponsors.

In addition to these two measures, a joint resolution to disapprove the proposed agreement (H.J.Res. 85) had already been introduced in the House on May 14, the day after the President submitted the agreement to Congress. This resolution has the text specified by section 130.i.(1),

and was referred to the Committee on Foreign Affairs, but was not introduced at the beginning of the 60-day period by the leaders of the Committee on Foreign Affairs or their designees. In accordance with the statute, it appears that H.J.Res. 85 does not count as the one required to be automatically introduced, but that this resolution would be eligible for expedited consideration under the act, and if enacted before the end of the 60-day period, would suffice to prevent the agreement from going into effect.

Committee Action

Consultations With Committees

Section 123.b. of the AEA directs that after the President submits the text of the agreement to the pertinent committees, he is to consult with them thereon during the stated period of “at least 30 days of continuous session.” This provision does not specify the form to be taken by these consultations. During the 60 days of continuous session after the agreement itself is submitted to Congress, on the other hand, section 123.d. specifies that the committees of referral are to “hold hearings on the proposed agreement ... and submit a report to their respective bodies recommending whether it should be approved or disapproved.”³⁹ Presumably, if the committee decides to recommend disapproval, the report in question could be that which accompanies the resolution of disapproval itself. If the committee favors approval, the report might accompany an approval resolution, or it might simply be explanatory, without accompanying any legislation.⁴⁰

Committee Action on Agreement with Russia

The relation between these statutory requirements and initial congressional action on the proposed agreement with Russia again reflects possible ambiguities. Congressional action began with the hearing of the House Committee on Foreign Affairs on June 12 and the closed briefing with the Senate Committee on Foreign Relations on June 17. Inasmuch as officials of the Department of State appeared at both sessions, these sessions could no doubt be understood as constituting the consultations for which section 123.b. calls. There seems no reason to suppose that consultations pursuant to section 123.b. might not take such a form.

It is not clear whether either committee conceived its session as also meeting the requirement of section 123.d. for hearings on the agreement itself subsequent to its submission to Congress. If they did, it is not clear whether hearings held after the agreement has been submitted and referred, but before the agreed beginning of the 60-day period during which section 123.d. calls for such hearings, could appropriately be regarded as also satisfying the requirements of section 123.d.. Even if the earlier sessions cannot be regarded as satisfying the requirement of section 123.d., however, it does not appear that this requirement could be enforced through any procedural action on the floor.

Discharge of Committee

Timing of Discharge

Under section 130.i.(4) of the AEA, each committee of referral is automatically to be discharged from the further consideration of all disapproval resolutions referred to it at the end of 45 days

³⁹ Section 123.d. (42 U.S.C. 2153(d)).

⁴⁰ The committee might also wish to advocate approval with conditions. In this case, the report might accompany a measure providing for that action, as described in the section on “Alternative Action,” below.

from the date of submission of the agreement. This provision appears intended to guarantee that a disapproval resolution will become eligible for timely floor consideration in each chamber even if the committee takes no action. The statute, however, does not define this time period in terms of days of continuous session. This omission will apparently have different effects in the two houses.

In the House of Representatives, it is the practice to construe references in its procedures to “days,” if not otherwise specified, as legislative days.⁴¹ A legislative day ends each time the chamber adjourns, and another begins each time it convenes after an adjournment. Accordingly, “legislative days” normally correspond to days of session.⁴² As a result, legislative days are likely to elapse more slowly than days of continuous session, which, except during recess periods, include all calendar days. If both chambers convene on Monday through Friday in each week, for example, five legislative days per week would probably occur in each chamber, although seven days of continuous session per week would elapse.⁴³ In some circumstances, 45 legislative days might even last longer than 60 days of continuous session. In that case it would be impossible for the chamber to consider a disapproval resolution before the agreement took effect under the statute, unless the committee chose to report the resolution rather than be discharged. It is not clear whether the possibility of such a result was intended by the statute or arises from an inadvertent oversight in drafting.

The Senate also has often interpreted “day” to mean “legislative day” unless otherwise specified.⁴⁴ In the case of the statutory language of the AEA, however, it appears that the Senate will interpret “day,” if not otherwise specified, as meaning a calendar day.

Possible Discharge of Agreement with Russia

In the present instance, 18 legislative days elapsed in the House from June 24, the beginning of the 60-day period, through August 1, the last day of session before the summer non-legislative period, but 28 days of continuous session occurred during the same period. If the House were to remain in session five days per week after it reconvenes on September 8, it will not reach the 45th legislative day after June 24 until October 14. Even if Congress has not adjourned *sine die* by then, the 60th day of continuous session would probably already have been reached on October 9, as estimated above.⁴⁵ Accordingly, committee discharge in the House might not occur until after the agreement had already gone into effect and could no longer be disapproved under the terms of the statute. Unless the committee chooses to report the resolution to disapprove for the agreement

⁴¹ See U.S. Congress, House, *Hinds' Precedents of the House of Representatives of the United States*, by Asher C. Hinds (Washington: GPO, 1907), vol. IV, sec. 3192; U.S. Congress, House, *Cannon's Precedents of the House of Representatives of the United States*, by Clarence Cannon (Washington: GPO, 1935), vol. VI, sec. 723; U.S. Congress, House, *Deschler-Brown Precedents of the United States House of Representatives*, by Lewis Deschler and William Holmes Brown (Washington: GPO, nd), vol. 13, ch. 29, sec. 67.9.

⁴² Exceptions today are not common, but in recent decades were more frequent in the Senate than in the House. Exceptions occur when a chamber does not adjourn, but takes a recess, overnight or longer, or, conversely, when it adjourns briefly and reconvenes in the course of a single calendar day.

⁴³ If both houses held *pro forma* sessions during a non-legislative period, days of continuous session would elapse even more quickly compared to legislative days in each chamber. For example, if each house convened two *pro forma* sessions during a non-legislative period running from one Saturday through the second following Sunday, the period would consume nine days of continuous session, but only two legislative days in each chamber.

⁴⁴ See “Day” in U.S. Congress, Senate, *Riddick's Senate Procedure: Precedents and Practices*, S.Doc. 101-28, 101st Cong., 2nd sess. by Floyd M. Riddick and Alan S. Frumin, rev. and ed. by Alan S. Frumin (Washington: GPO, 1992), pp. 712-715.

⁴⁵ See “Days of Continuous Session in the 110th Congress,” above.

with Russia, the provision of section 130.i. for automatic discharge may not afford the House a timely opportunity to act on the matter during the 110th Congress.

In the Senate, the referral statement for S.J.Res. 42 explicitly states that the measure is “referred to the Committee on Foreign Relations pursuant to 42 U.S.C. 2159 [which corresponds to AEA section 130.] for not to exceed 45 calendar days.” The date of introduction having been June 24, the 45th calendar day thereafter was August 8, which fell during the summer non-legislative period. The committee was presumably regarded as automatically discharged from the Senate joint resolution on August 8, or perhaps on the next day of Senate session thereafter. During the non-legislative period, however, the Senate is operating under a unanimous consent order for periodic pro forma sessions, during which no legislative business is to occur. This order against legislative business might be held to preclude the discharge from occurring until the Senate returns for business on September 8. In any case, nevertheless, it appears that the measure will become available for Senate floor consideration no later than September 8, well before the expiration of the 60-day period for congressional action projected for October 9 (if Congress remains in session).

As already explained, however, even if the Senate does adopt a joint resolution of approval, and the measure goes on to enactment, it would have no bearing on the statutory procedure authorizing the agreement to take effect unless disapproved within 60 days of continuous session after June 24. It appears, nevertheless, that the discharge of the committee from joint resolution of approval might affect the possibility of congressional disapproval of the proposed agreement in another way. AEA section 130.i.(4) says that:

If the committee ... to which a joint resolution has been referred has not reported it at the end of 45 days after its introduction, the committee shall be discharged from further consideration of the joint resolution or of any other joint resolution introduced with respect to the same matter

It appears that the Senate would interpret this provision to mean that the discharge of any one joint resolution with respect to an agreement will preclude the discharge of any other joint resolution with respect to the same agreement. Under this reading, even if some Senator were to introduce a disapproval resolution on the proposed agreement with Russia, once the committee either reports or is discharged from the approval resolution, the disapproval resolution would effectively be precluded from reaching the floor (unless the committee chose to report that measure as well).⁴⁶

Chamber Action

Section 130.i. of the AEA provides that, once the committee in either chamber reports or is discharged from a joint resolution to disapprove a nuclear cooperation agreement, the measure is to be placed on the chamber’s calendar of business.⁴⁷ The provision then directs that the disapproval resolution be considered under expedited (or “fast track”) procedures, the purpose of which is to ensure that Congress will have an opportunity to consider and vote on the measure before the arrival of the time at which the agreement would otherwise automatically take effect. Section 130.i., however, does not itself specify procedures for floor consideration of a resolution

⁴⁶ The Senate might also discharge the committee from the disapproval resolution under its general rules, but this proceeding is difficult to accomplish, and consequently rare, except when done by unanimous consent.

⁴⁷ In the Senate, the resolution would be placed on the Calendar of General Orders, which carries most measures eligible for floor consideration. In the House, the measure would most likely be placed on the Union Calendar, which is for measures that may affect revenues or expenditures.

of disapproval. Instead, for the Senate, it applies an expedited procedure contained in another statute, and for the House, it presumes that the procedures used will be established by a special rule, reported by the Committee on Rules and adopted by the House.

For the Senate, section 130.i.(5) of the AEA provides that floor consideration shall occur pursuant to section 601(b)(4) of the International Security Assistance and Arms Export Control Act of 1976 (ISAAECA).⁴⁸ This provision of law established an expedited procedure, for the Senate only, that has been made applicable to additional classes of measure by several subsequent laws. Pursuant to this expedited procedure, the joint resolution of disapproval is privileged, meaning that the Senate may take it up by approving a non-debatable motion to proceed to consider. ISAAECA also limits debate on the resolution itself to 10 hours (equally divided and controlled by the two floor leaders or their designees), and precludes any amendment (or motion to recommit). A non-debatable motion further to limit debate is allowed, various other potentially dilatory actions are prohibited, and limits are placed on the debate of questions arising during consideration. Provisions similar to these are standard components of statutory expedited procedures.

Section 130.i.(5) establishes no regulations for House floor consideration of the resolution of disapproval, nor does it even make the measure privileged for consideration (which, in the House, means that the measure could be called up with priority over the regular order of business). Instead, section 130.i.(5) authorizes the Committee on Rules to report a special rule providing for consideration of the measure under terms that “may be similar, if applicable” to those of ISAAECA. Any special rule for consideration of a disapproval resolution would surely place limits on debate, and would most likely prohibit amendments as well, inasmuch as any change in the text of the resolution would render it inconsistent with the requirements of section 130.i.(1), and therefore, presumably, ineligible for further consideration under the expedited procedure of section 130.i.

This provision of the AEA grants the Committee on Rules no power that it would not otherwise have. Nevertheless, unless the Committee on Rules reports a special rule for considering a disapproval resolution, or unless privilege for consideration is conferred on the measure by some other means (e.g., suspension of the rules or unanimous consent), section 130. would afford no means by which House floor consideration of the measure could be ensured.

Final Congressional Action

Section 130.i.(6) of the AEA makes provision to preclude the necessity to resolve differences between disapproval resolutions passed by the two chambers. If one chamber adopts its resolution and transmits it to the other, then the receiving chamber considers its own companion measure, but takes the final vote on the measure received from the first house. This automatic “hookup” is evidently intended to ensure that final action in both houses will occur on the same measure in the same form, so that it can be cleared for presentation to the President without the necessity for a conference committee or other process of resolving differences between versions of the measure adopted by the two chambers.⁴⁹

This procedure, however, is predicated on a presumption that the measures initially passed by the two chambers will be substantively similar. Although section 130.i.(6) is stated as applying to “a joint resolution described in paragraph (1)” and a joint resolution of the other house “with respect to the same matter,” it does not seem to contemplate a situation in which one of the measures is a disapproval resolution and the other an approval resolution. If an “automatic hookup” were

⁴⁸ P.L. 94-329, 90 Stat. 729 at 766.

⁴⁹ Similar provisions, again, appear in several other statutory expedited procedures.

applied under these conditions, it would result in the final vote of the second house occurring on a measure which would have an effect opposite to that of its own measure that it had just been considering.

In practice, however, although the provision is framed as applying even if the two resolutions address the same matter in opposite senses, it appears that in such a case the chamber acting second would consider the provision for automatic hookup inoperative. The consequence of doing so would presumably be that the chamber acting second would instead vote on the adoption of its own measure. If it voted to adopt, the chamber could then take any of several actions: (1) send its own measure to the chamber that acted first for concurrence; (2) take up the measure received from the other chamber and act on it under its general procedures, without the restrictions of the expedited procedure; or (3) by unanimous consent, take up the measure received from the first chamber, amend it by substituting the text of its own measure, and return it to the first for concurrence or for the resolution of differences, either with a request for conference or through an exchange of amendments between the houses. Any of these alternatives would likely delay final congressional action on the matter.

Presidential Action

Pursuant to section 123.d. of the AEA, the proposed nuclear cooperation agreement with the Russian Federation will take effect at the end of the total period of 90 days of continuous session unless a joint resolution of disapproval is enacted before that time. It is not sufficient for Congress to complete action on the disapproval resolution within the required time; the measure must actually *become law* before the end of the prescribed period. Enactment into law of the resolution requires either that (1) the President signs it or allows it to pass into law without his signature; or (2) the Congress overrides his veto. For Congress to prevent the agreement from taking effect, one of these actions would have to take place before the end of the 90-day period.

Under the Constitution, the President has 10 days (Sundays excepted) to act on a measure after it is presented to him. As a result, if a resolution of disapproval were to be presented when fewer than 10 *calendar* days (excluding Sundays) remained in the total period of 90 days of *continuous session*, it appears that the President could render the measure moot by failing to act until the 90-day period expired and the agreement went into effect. Similarly, if the President were to return the resolution with a veto, the agreement would take effect unless Congress were to complete action to override the veto before the 90th day of continuous session after the initial submission of its text to the committees.

In practice, the President is likely to veto a resolution disapproving an agreement of which, under the statute, he has already certified his approval. For Congress to make effective use of its opportunity under the AEA to disapprove the agreement, accordingly, it would presumably have to present the resolution of disapproval to the President at a point when a minimum of 11 days of continuous session remain in the 90-day period before the agreement automatically becomes effective. (The minimum is 11 if Congress remains in session, such that every calendar day is a day of continuous session, inasmuch as any period of 10 calendar days will contain at least one Sunday that will count as a day of continuous session but not as a day of the period for presidential action.) A still longer period would afford Congress a more practicable opportunity to act to override the veto.

Specific implications of this circumstances for the agreement with Russia can be illustrated only through assumptions about the *sine die* adjournment of the 110th Congress. Assume, for example, that Congress maintains the announced schedule described above, in the section on “Days of Continuous Session in the 110th Congress,” through September 26, 2008, but instead of

adjourning *sine die* on that date, recesses its session until November 12. As discussed earlier, September 26 would then presumably be the 77th day of continuous session, and November 12 would be the 78th. Under these circumstances, if Congress completes action on the resolution of disapproval and presents it to the President on September 26, just before recessing, the 10-day period allowed for presidential action would extend until October 8, and when Congress returned on November 12, it would have until the 90th day of continuous session (presumably Monday, November 24) to prevent the agreement entering into effect by overriding the veto.

If, on the other hand, Congress did not complete action on the resolution of disapproval until it reconvened on November 12, the 10 days allowed for presidential action would last until Monday, November 24. Assuming Congress remained in session, however, its 90th day of continuous session after submission of the agreement would also be November 24. Under these circumstances, Congress might effectively be able to ensure the disapproval of the agreement only if both houses could complete action to override the veto on that same day.

Finally, if Congress were to adjourn *sine die* shortly after adopting the disapproval resolution, the President could pocket veto it. If this *sine die* adjournment occurred after the 90th day of continuous session, the agreement would go into effect. On the other hand, if the adjournment occurred on or before the 90th day of continuous session, the agreement presumably could not go into effect until the appropriate period of continuous session had elapsed beginning with the convening of the 111th Congress, and then only if no congressional disapproval was accomplished during that period.⁵⁰

Alternative Action

Although the AEA provides the expedited procedures described above for congressional action on a joint resolution of disapproval, it does not *require* Congress to use these procedures to act on the matter. If, during the period for action provided by the statute, Congress were to adopt a disapproval resolution meeting the requirements of section 130.i. under any of its regular procedures, enactment of the resolution would have the same effect of disapproving the agreement as would that of a similar measure under the expedited procedures of the statute. Disapproval might also be accomplished by legislative “riders” on an omnibus appropriations bill or in any other measure.

Under its general legislative power, Congress could also determine the status of the agreement by acting on a measure other than the one prescribed by the statute. Such action occurred in the 99th Congress (1985-1986), when Congress enacted a measure (P.L. 99-183) providing that a nuclear cooperation agreement with China would become effective only when certain further conditions were met. Just as with the disapproval resolution specified by the statute, however, any such measure would have to be enacted before the end of period required by the AEA, because otherwise the agreement as submitted would automatically go into effect. On the other hand, inasmuch as any such alternative measure would not meet the requirements of section 130.i. for a joint resolution of disapproval, the measure would not be eligible for consideration under the expedited procedures of section 130.i. Instead, each house would have to consider it under its regular legislative procedures (unless it chose, in accordance with its own general procedures, to apply the expedited procedure to the alternative measure).

⁵⁰ This period might encompass either 90 or 60 days, depending on interpretation, as explained above under “Possibility of Renewing Action in the 111th Congress.”

Any measure granting approval with conditions to the proposed agreement with Russia would presumably have to contain language specifying that its provisions apply “notwithstanding section 123. of the Atomic Energy Act of 1954, as amended.” Section (a)(2) of P.L. 99-183, granting conditional approval to the agreement with China, contained a provision of this kind. In the absence of such a provision, the provision of section 123. for automatic unconditional approval at the end of the 90 days would presumably continue to apply, so that in spite of the conditional approval, and unless the joint resolution of disapproval specified by section 130.i. were enacted into law, the agreement might take effect without conditions at the end of the period.

The President might also be able to vitiate an attempt by Congress to place conditions on its approval of the agreement with Russia by vetoing the measure. Unless Congress could override the veto (or secure enactment into law of a joint resolution of disapproval), the agreement would then instead go into effect without conditions at the end of the period prescribed in accordance with section 123.

Finally, Congress might act on a measure enabling the proposed agreement with Russia to take effect immediately, without conditions. For this purpose, a measure having the text of S.J.Res. 42, stating only that Congress “does favor” the proposed agreement, would not suffice, because no statutory provision authorizes an agreement subject to congressional disapproval either to take effect, or to take effect before the conclusion of the period defined by the AEA, simply because Congress states its approval. Rather, any such measure would presumably have to state explicitly that the agreement could take effect upon enactment notwithstanding the provisions of section 123. of the AEA.

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